RE BENJAMIN TAINE & ANOR

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DAVID WONG DAK WAH J
[APPLICATION NO: K34-27-2008-I]
17 JULY 2009

FAMILY LAW: *Children - Adoption - Application made by residents of State of Sabah to adopt infant who was an offspring of a legal foreign worker - Whether infant a person residing in Sabah - Adoption Ordinance 1960, s. 4(5) - Immigration Regulations 1963, reg. 16 - Federal Constitution, art. 19*

FAMILY LAW: *Adoption - Infant - Application made by residents of State of Sabah to adopt infant who was an offspring of a legal foreign worker - Whether infant a person residing in Sabah - Adoption Ordinance 1960, s. 4(5) - Immigration Regulations 1963, reg. 16 - Federal Constitution, art. 19*

The issue in the present application was whether an infant who was an offspring of a legal foreign worker (an Indonesian female) was entitled to be adopted by applicants who were residents of the State of Sabah under the Adoption Ordinance 1960 ('Ordinance'). Since s. 4(5) of the Ordinance prescribes the requirement that both the applicants and the infant must reside legally in Sabah for an adoption order to be made, what required determination was whether the infant resided in Sabah in the context of the Ordinance.

Held (dismissing the application):

(1) From the wording of reg. 16 of the Immigration Regulations 1963 (containing the rights given to a foreign worker), it could easily be seen that the sole purpose of a "work pass" was to allow the infant's natural mother the right to work in Sabah only. The "work pass" was only for a limited period and could also be cancelled if there had been a breach of any of the conditions attached to it. From that, it was clear that a "work pass" did not confer on her any permanency of residential status. Being allowed to stay in Sabah under a work pass was only coincident to her right to work which she derived from the work pass. This view was fortified by the existence of other provisions in the Act dealing specifically with applicants wishing to reside in Malaysia. Further, unlike other countries there is

A no legislation which gives infants born to legal migrant workers in Malaysia a right of residency or citizenship. This much is clear from art. 19 of the Federal Constitution. For the reasons stated above, the infant was not a person residing in Sabah under the Ordinance.

B

Case(s) referred to:
Levene (Appellant) v. Inland Revenue (Respondents) [1928] UKHL 1 ***(refd)***

Legislation referred to:
Adoption Ordinance 1960, s. 4(5)
C Federal Constitution, art. 19
Immigration Act 1959/63, s. 12
Immigration Regulations 1963, reg. 16

For the applicants - Priscilla Ruth Marcus; M/s Kurup Robert Marcus & Co

D *Reported by Suresh Nathan*

JUDGMENT

E **David Wong Dak Wah J:**

[1] The issue in this matter is simply this:

> Whether an infant who is an offspring of a single mother and a foreign worker is entitled to be adopted by applicants who are
F resident in the State of Sabah under the Adoption Ordinance?

[2] Determination of this issue requires construction of s. 4(5) of the Adoption Ordinance 1960 which reads as follows:

> An adoption order shall not be made in respect of any infant unless
G the applicant and the infant reside in Sabah.

[3] This section prescribes the requirement that both the applicants and the infant must reside in Sabah. Needless to say both the applicants and infant must also be residing in Sabah
H legally. Deliberation of the above issue requires me to determine whether the infant resides in Sabah in the context of the Adoption Ordinance.

I

[4] Before I discuss the issue I should first set the legal status of the infant. She is the offspring of a female Indonesian worker in Sabah while the natural father of the infant cannot be located and information as to his status of nationality and residence is also unknown. Under such circumstances it is of course undisputed that the residential status of the infant in law will be that of her mother who now lives in Sabah pursuant to a work pass issued by the Immigration Department. The infant under the law is also an Indonesian by virtue of her mother's nationality. However from my query as to the status of the infant under the Immigration Act, I was given an answer which I must admit that I cannot comprehend. Common sense dictates that the infant being a foreigner requires a visa to remain in Malaysia in the same way as her mother. In fact this is provided for under s. 12 of the Immigration Act which states as follow:

> **12. Endorsement of name of wife and children on Permits, Passes and Certificates.**
>
> Subject to such conditions as may be prescribed it shall be lawful for the Director General, on application made in that behalf in the prescribed form by the holder of, or by an applicant for, a Permit, Pass or Certificate, to endorse upon the Permit, Pass or Certificate issued to the person the name or names of the wife or child of that person.

[5] Why this was not done, the court is not informed.

[6] I now deliberate on what the word 'reside' means. The word is not defined in the Adoption Ordinance; hence the need to look to other sources. Viscount Cave LC in *Levene (Appellant) v. Inland Revenue (Respondents)* [1928] UKHL 1 adopted what was stated in the Oxford English Dictionary:

> My Lords, the word "reside" is a familiar English word and is defined in the Oxford English Dictionary as meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place." No doubt this definition must for present purposes be taken subject to any modification which may result from the terms of the Income Tax Act and Schedules; but, subject to that observation, it may be accepted as an accurate indication of the meaning of the word "reside".

[7] The definition adopted by Lord Cave in my view requires an element of permanency in one's dwelling and to determine that one must apply an objective test in that the circumstance in which infant came to stay in Sabah must be taken into consideration. It must be stressed that Lord Cave's definition must of course be read in the context of the Adoption Ordinance as opposed to a Tax Act where the primary purpose is to ensure that income of resident tax payers are taxed and paid.

[8] The starting point in my deliberation must be to determine what rights the law gives to a foreign worker. Those rights are contained in reg. 16 of Immigration Regulations 1963 which reads as follow:

16. Work Pass for Sabah

(1) A Work Pass may be issued by the Controller to any person other than a prohibited immigrant who satisfies the Controller that he wishes to enter Sabah (whether from within or from outside the Federation) in order to take up work or employment in Sabah and that:

(a) he is qualified to work or undertake employment in the trade, business or calling in respect of which the application is made; and

(b) there is not already unemployment in Sabah of persons skilled in that class of trade, business or calling; and

(c) his taking up such work or employment will be to the benefit generally of Sabah.

(2) Subject to the conditions stated in the Pass and to these Regulations, a Work Pass shall authorise the holder thereof to enter the Federation or to enter Sabah from within the Federation (as the case requires) within the period stated in the Pass and to remain therein for the purpose of working or engaging in employment in Sabah as specified in the Pass for such period not exceeding five years as shall be stated in the Pass, and the Pass may specify the employer or proposed employer by whom such person may only be employed:

Provided that the Controller may, in his discretion, extend the period of validity of a Work Pass from time to time for any period not exceeding five years at any one time.

(3) Every Work Pass issued to any person under this regulation shall be subject to the conditions that the holder shall take up the work or employment specified in the Pass and shall continue therein during the validity of the Pass.

(4) Where a person is specified in a Work Pass as the employer or proposed employer of the holder, that person shall forthwith inform the Controller if the holder:

(a) fails to take up the employment; or

(b) is discharged from, or leaves, the employment.

(5) A Work Pass may at any time be cancelled by the Controller, and shall be cancelled if the holder does not observe the conditions required by the paragraph (3) of this regulation.

(6) The Controller may require any person applying for a Work Pass to make application therefor in the Form 17 set out in the Second Schedule hereto, supported by a declaration in the form set out in Part II and a covenant in the form set out in Part III of Form 17 made by a person resident in the Federation, and to furnish the Controller with two recent photographs of the applicant.

(7) A Work Pass shall be in the Form 18 set out in the Second Schedule hereto, or in the form of an endorsement on the passport or internal travel document of the applicant as the Controller may determine.

[9] From the wordings of the above, one can easily see that the sole purpose of a 'work pass' is to allow the infant's natural mother the right to work in Sabah only. That work pass is only for a limited period and can also be cancelled if there has been a breach of any of the conditions attached to the work pass. From that it is my finding that the intention of Parliament is clear and that is a 'work pass' does not confer on her any permanency of residential status. Being allowed to stay in Sabah under a work pass is only coincident to her right to work which she derives from the work pass. My view is fortified by the existence of other provisions in the Immigration Act dealing specifically with applicants wishing to reside in Malaysia. Further, unlike other countries there is no legislation which gives infants born to legal migrant workers in Malaysia a right of residency or citizenship. This much is clear in art. 19 of the Federal Constitution which reads as follows:

19. Citizenship by naturalization

(1) Subject to Clause (9), the Federal Government may, upon application made by any person of or over the age of twenty-one years who is not a citizen, grant a certificate of naturalization to that person if satisfied:

(a) that:

(i) he has resided in the Federation for the required periods and intends, if the certificate is granted, to do so permanently;

(ii) (Repealed);

(b) that he is of good character; and

(c) that he has an adequate knowledge of the Malay language.

(2) Subject to Clause (9), the Federal Government may, in such special circumstances as it thinks fit, upon application made by any person of or over the age of twenty-one years who is not a citizen, grant a certificate of naturalization to that person if satisfied:

(a) that he has resided in the Federation for the required periods and intends, if the certificate is granted, to do so permanently;

(b) that he is of good character; and

(c) that he has an adequate knowledge of the Malay language.

(3) The periods of residence in the Federation or the relevant part of it which are required for the grant of a certificate of naturalization are periods which amount in the aggregate to not less than ten years in the twelve years immediately preceding the date of the application for the certificate, and which included the twelve months immediately preceding that date.

(4) For the purposes of Clauses (1) and (2) residence before Malaysia Day in the territories comprised in the States of Sabah and Sarawak shall be treated as residence in the Federation; and for purposes of Clause (2) residence in Singapore before Malaysia Day or with the approval of the Federal Government residence in Singapore after Malaysia Day shall be treated as residence in the Federation.

(5) A person to whom a certificate of naturalization is granted shall be a citizen by naturalization from the date on which the certificate is granted.

[10] For reasons stated above I find that the infant is not a person who resides in Sabah under the Adoption Ordinance. Accordingly this application is dismissed.